No. 92-1949

(6)

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a law enforcement officer may ask questions limited to clarifying a suspect's wishes when the suspect makes an ambiguous comment regarding counsel during a custodial interrogation.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-11a, is reported at 36 M.J. 337. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 12a-15a, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 11, 1993. The petition for a writ of certiorari was filed on June 8, 1993, and was granted on November 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself. * * *

Article 31 of the Uniform Code of Military Justice provides (10 U.S.C. 831):

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

STATEMENT

Petitioner, a member of the United States Navy, was convicted at a general court-martial on one specification of unpremeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank to pay grade E-1. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. Pet. App. 12a-15a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-11a.

1. On the evening of October 2, 1988, Seaman Keith Shackleton played pool with petitioner in the Enlisted Men's Club at the United States Naval Base in Charleston, South Carolina. Tr. 583, 606, 619-620, 639-641, 714, 728, 746-747. Shackleton lost the game and a $30 wager, but he refused to pay. After the club closed, petitioner killed Shackleton on the loading dock of the commissary, a short distance from the club, by beating him with a pool cue. Tr. 714, 728, 746-747. Shackleton's body was found early the next morning by a milk delivery man. Tr. 662.

In the first stage of the ensuing investigation, some 100-250 sailors were interviewed, including petitioner. J.A. 36. During his first interview on October 20, 1988, petitioner said that he was at the Enlisted Men's Club playing pool on the night of the murder. Appellate Exhibits (AXs) 28, 36; J.A. 68; Tr. 792-796. Petitioner said that he recognized a photograph of Shackleton and believed that he had played pool with him. Tr. 792-796. He also said that two individuals named Wade Bielby and Bonnie Krusen had told him about Shackleton's murder and had told him that Shackleton had been "beaten with a pool stick." AX 28; see also Tr. 65, 792-796.[1] At the end of the interview, petitioner agreed to turn his

[1] Both Krusen and Bielby testified that they had not discussed Shackleton's murder with petitioner during the pertinent time period. Tr. 852-853, 855.

pool cues over to the Naval Investigative Service (NIS) agents. *Ibid.*[2] While surrendering his two pool cues and their case, petitioner pointed out a stain that he said he thought was either his blood or catsup. AX 28; Prosecution Exhibit (PX) 7; Tr. 795-796.

As the investigation continued, NIS agents discovered that shortly after Shackleton's murder, petitioner told several fellow sailors that he had committed the crime. Petitioner's account of the murder involved details of the crime that only the murderer would have known, or otherwise clearly indicated that petitioner had been involved in the murder. For example, on October 5, 1988, in a conversation that Petty Officer David Guidry had with petitioner, Guidry said he had heard that Shackleton died by falling and injuring his head. Petitioner corrected Guidry, stating that Shackleton had been "beat up and stuck with a pool stick." Tr. 269-270, 702. In addition, on October 27, petitioner told Petty Officer Ronald Mull that NIS was investigating petitioner for the murder of the man killed behind the commissary. Tr. 746. When asked directly if he did it, petitioner told Mull, "Yes, I did." *Ibid.* Petitioner told Mull that he was playing pool at the Enlisted Men's Club and "beat the guy out of $30.00" and that the "guy" did not want to pay. Tr. 747. The two had an argument, and they ended up outside the

[2] NIS agents had been looking for people who owned their own pool cues based on preliminary indications that Shackleton's injuries were consistent with being struck by a pool cue. J.A. 14, 23. NIS obtained cues from several individuals during the investigation. J.A. 23.

club. *Ibid.* Mull testified that petitioner related the following, *ibid.*:

> He said that he hit the guy with a pool—his pool stick a couple of times and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. He said—I don't know exactly where he was at, but he said he drug the guy's body behind the commissary and then he said he ran down into the woods and left the base somehow. * * * He said he went to a girlfriend's house. * * *

Petitioner told Mull that he had an alibi; he was seen by several people with "some girl" at the club. Petitioner also said that NIS had taken his pool cues and that one of them had a blood stain that he had tried to wash off and erase with sandpaper. Petitioner said he was not worried, however, because he had the same blood type as the victim. *Ibid.*[3] Petitioner also made various other, similar incriminating statements.[4]

[3] Petitioner was wrong. His blood type is B; Shackleton's was O. Tr. 907-908, 914.

[4] On October 19, 1988 (the day before NIS first interviewed petitioner), petitioner told Petty Officer Steven Brothers that he had been accused of murder. Tr. 274, 707. When Brothers asked why, petitioner said that the authorities had found someone dead on the base, that he had played pool with the victim the night before, and that the authorities were accusing him of beating the victim with a pool cue. Tr. 274, 708.

One day in October 1988, petitioner told Petty Officer Richard Kuhn that NIS had taken his pool cues because he had played pool with this "guy." Petitioner also stated that the "guy" owed him money after the game but did not pay, so petitioner hit him over the head with a pool cue. Tr. 288,

With those statements in hand, NIS agents arrested petitioner on November 4. J.A. 118.[5] After receiving the appropriate warnings both orally and in writing, petitioner agreed to talk with two NIS agents. J.A. 170 (AX 37); see also J.A. 118-119, 151-152, 175 (AX 40). When asked if he wanted to have a lawyer present, petitioner specifically declined. J.A. 118-119, 175 (AX 40). He then signed a form indicating that he wished to waive his rights to remain silent and to have a lawyer present during questioning. J.A. 170 (AX 37).

During the first part of the interview, petitioner described his activities during October 1 and 2, 1988. AXs 38, 40; Tr. 957-958. Specifically, petitioner stated that he was at the Enlisted Men's Club with his girlfriend. He said he may or may not have played pool, but that he always has his pool cues with

714. Petitioner also told Kuhn that he did not know whether the victim had died, and that he did not care. *Ibid.*

In mid-October 1988, when asked why he was not playing pool, petitioner told Petty Officer Walter Crayton Black that NIS had taken his pool cues. Tr. 272, 728. Petitioner explained that someone had been killed on the base, that he had been playing pool with him, that he was the last one seen with him at the Enlisted Men's Club, and that he had won $30 from the victim but had no reason to be involved in the murder. *Ibid.*

[5] Petitioner was arrested as he was released from a psychiatric evaluation that his command had ordered because he had made statements to the effect that he wanted to kill someone just to see what it was like. AX 31; Tr. 207-208, 1101-1103. In addition, on October 20, 1988, petitioner told his division officer that he felt like shooting someone, "[b]etter yet, a cop because then I know [they] will kill me." AX 33; Tr. 775. The latter statement was not admitted at trial. *Ibid.*

him. *Ibid.* Petitioner said that he subsequently went to an off-base nightclub called "J.W.'s" and then to his girlfriend's house. *Ibid.*

The NIS agents confronted petitioner with his girlfriend's statement that she was not at the Enlisted Men's Club that night. Tr. 958-959. Petitioner then changed his story, saying that he was at the Enlisted Men's Club with some friends. AXs 38, 40; Tr. 959. The agents then confronted petitioner with a statement he had made indicating that he had won $30 playing pool with Shackleton. AXs 38, 40; Tr. 960. Petitioner denied playing pool with Shackleton and denied winning $30. *Ibid.*

About 80 minutes into the interview, petitioner made what the agents characterized as "an offhanded comment" (J.A. 142, 152), saying, "Maybe I should talk to a lawyer." AXs 38, 40; J.A. 120, 129, 135, 152. The agents immediately stopped all questioning of petitioner and sought to clarify his request, explaining that if he wanted an attorney, they would not ask him any more questions. J.A. 151. Special Agent Sentell described the ensuing exchange as follows:

> [I] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, ["]No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it.

J.A. 136; see also J.A. 132-133, 139, 142, 151-154, 160-163.

After confirming that petitioner did not want a lawyer, the agents recessed for a short break. Petitioner was asked if he wanted a drink or a cigarette. J.A. 120, 128, 158.[6]

At the beginning of the second portion of the interview, the NIS agents reminded petitioner that he still enjoyed the rights about which he previously had been advised. J.A. 130. Petitioner began to discuss a conversation that he had with Petty Officer Guidry, during which he told Guidry that the man who died behind the commissary had been killed with a pool cue. When asked why he said that, petitioner said he like to "mess" with people and make them think he knew more than he did. AXs 38, 40; Tr. 961. When asked why he said the man had been "hit and jabbed," petitioner said that he added that detail in order to make his description sound more realistic. Petitioner then changed his story, stating that Bielby had told him the details about the pool cue. *Ibid.*

Petitioner said that he knew who had killed Shackleton, and he named one "Jeff Kaiser." AXs 38, 40; Tr. 961. Petitioner's basis for that opinion was that Kaiser did not go to the club for almost a month after the murder because Kaiser was scared and because he had been "doing acid" that night and may have done something he did not remember. *Ibid.* Petitioner finally said that if he had killed someone, he would have had to tell somebody. AX 40; Tr. 961.

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[6] Petitioner also used the bathroom once during the interview. J.A. 162.

The NIS agents then confronted petitioner with the fact that he *had* told someone, and that the person he had told had provided a sworn statement to NIS. J.A. 143. At that point, petitioner said, "I think I want a lawyer before I say anything else." The agents immediately terminated the interview. J.A. 136-137; see also AX 40; J.A. 133, 138-141, 143, 162-163.

2. Before trial, petitioner moved to suppress the statements he made to the NIS agents during the November 4 interview. AX 9, No. 20. The trial judge held an evidentiary hearing on the motion. The government's witnesses testified that petitioner had been properly advised of his rights; that during the questioning he made an ambiguous statement regarding counsel; that the NIS agents ceased their questioning once petitioner made that statement; that petitioner then denied wanting to speak with counsel; and that when petitioner later asked to speak to an attorney, all questioning ceased. Petitioner gave a different version of the events.[7]

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[7] According to petitioner, the agents "were talking to me, and I said, 'Well, I'd like a lawyer,' and they said, 'We'll take a break,' and they walked out and left me handcuffed to the chair." J.A. 146. Petitioner said that later "[t]hey came back in and started questioning me again." *Ibid.* Petitioner indicated that, notwithstanding the fact that he understood he had a right to a lawyer, he did not pursue getting a lawyer when questioning began again because he "really did not understand * * * what was going on." J.A. 148. Petitioner stated that he asked for a lawyer again later using the same words, "I want a lawyer," at which time questioning stopped for the most part. J.A. 149. Based on that evidence, petitioner argued that the government had not established a valid waiver of rights at the outset of the interview and that he had requested and been denied counsel during the interview, in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Tr. 338-340.

After the hearing, the trial judge denied petitioner's motion. Specifically, the trial judge determined (J.A. 164):

> I think that pursuant to Military Rule of Evidence 304 that the accused was properly advised of his rights pursuant to Article 31 and the cases of *Miranda* and [*United States* v.] *Tempia*, [37 C.M.R. 249 (1967),] and that he intelligently and freely waived those rights. Moreover, I find the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel. * * * The motion to suppress the 4 November '88 statement is accordingly denied.

3. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. Pet. App. 12a-15a. Without comment, the court rejected the error raised here, among others, as meritless. *Id* at 15a.

4. The Court of Military Appeals affirmed, Pet. App 1a-11a, holding that "the limited results of the November 4 interview were properly admitted in evidence," *id.* at 9a. The court noted that the military judge had resolved against petitioner the conflict between the NIS agents' testimony and petitioner's, and that the judge's resolution of that factual issue was not clearly erroneous. *Ibid.*

With respect to the legal question whether petitioner's statement, "Maybe I should talk to a lawyer" invoked his right to counsel, the Court of Military Appeals held that the comment did not constitute an unequivocal request for counsel, and that the agents

therefore "properly conducted further limited questioning to clarify [petitioner's] ambiguous comment." Pet. App. 9a. Following the majority rule, the court held that when a suspect makes an ambiguous reference to counsel in the course of custodial interrogation, law enforcement authorities may make limited inquiries in order to "clarify[] the suspect's desires regarding counsel." *Id.* at 10a. The court emphasized that, in responding to an ambiguous reference to counsel, the authorities "may not attempt to persuade the suspect that counsel is not necessary or desirable, or presume to tell the suspect what counsel's advice is going to be." *Ibid.* Applying those principles to this case, the court found that the NIS agents' inquiries were appropriately limited to clarifying petitioner's ambiguous reference to counsel, and that their conduct did not interfere with petitioner's right to counsel under *Miranda*. *Id.* at 10a-11a.

SUMMARY OF ARGUMENT

I. The Court of Military Appeals correctly upheld the admission of the statements petitioner made after his ambiguous reference to counsel. Most courts have held that when a suspect makes an ambiguous reference to counsel during a custodial interview, law enforcement officers may ask questions to clarify the suspect's wishes. Under that approach, the limited inquiry made by the NIS agents to clarify petitioner's wishes regarding counsel was permissible, and the statements petitioner made after making clear that he did not want to consult with counsel at that time were therefore properly admitted.

A.1. The majority rule is consistent with the principles of *Miranda* v. *Arizona*, 384 U.S. 436

(1966), *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and their progeny. The "fundamental purpose" of the prophylactic rules prescribed in *Miranda* and *Edwards* is to give a suspect the right to choose whether to have a lawyer present during custodial interrogation. *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). To carry out that purpose, law enforcement officers not only have to advise a suspect of his right to make a choice regarding the presence of counsel but also have to determine what choice the suspect has made. When a suspect makes an ambiguous reference to counsel, the only way for the officers to ascertain the suspect's wishes is to ask questions to clarify his meaning.

2. A rule permitting law enforcement officers to clarify a suspect's wishes with respect to the presence of counsel strikes an appropriate balance between the competing concerns underlying *Miranda* and *Edwards*. It recognizes that a suspect in custody may have difficulty expressing a desire for counsel with precision; accordingly, when the suspect makes an ambiguous reference to counsel, the officers may not simply disregard it, but must suspend the interrogation until they have resolved the ambiguity by clarifying the suspect's wishes. At the same time, the rule recognizes that, when a suspect makes an ambiguous reference to counsel, the officers should not be forced to terminate the interview altogether. If the suspect's wishes can be clarified by a few neutral questions, there is nothing coercive or otherwise improper about adopting that course. And if from that line of questioning it is clear that the suspect does not wish to invoke his right to counsel, the officers should be free to continue the interrogation.

3. The approach urged by petitioner would not provide a "brighter line" for the police or the courts to apply than the majority approach provides; in each case, a determination must be made whether the particular words used by the suspect are sufficient to require the interrogation to stop, either temporarily or for good. And either rule will be reasonably easy to apply in most cases, but will present difficulties in close cases. The difference between the rules is that petitioner's rule will result, in some cases, in denying the police an opportunity to obtain (or requiring the suppression of) statements from persons who did not, in fact, wish to invoke their right to counsel during questioning.

4. The other approaches that courts have taken to ambiguous references to counsel do not comport with the principles of *Miranda* and *Edwards*.

A few courts have required law enforcement officers to treat any reference by a suspect to counsel, however ambiguous, as a request for counsel. That approach cannot be justified on factual or legal grounds. It is wrong to assume that every suspect who makes a reference to a lawyer wishes to have a lawyer present during questioning. Nor is it appropriate to presume that the suspect means to invoke counsel in such cases, based on this Court's decisions regarding the standards applicable to waivers of the right to counsel. This case involves the question whether a suspect intends to invoke his right to counsel after previously waiving it; in that context, there is no reason to presume from any reference to a lawyer that the suspect intends to withdraw his waiver and invoke his right to counsel. It is reasonable in that context for the agents to seek, through

neutral questioning, to find out whether the suspect wants a lawyer or not.

The other approach that courts have taken to ambiguous references to counsel permits the police to continue an interrogation until the suspect makes an unambiguous request for counsel. That approach is inconsistent with the principles of *Miranda* and *Edwards*, because it creates an undue risk that suspects will be denied their right to have a lawyer present during custodial questioning, even after they have made an effort to invoke that right. Insisting on a clear and unambiguous statement from a suspect under the pressures of custodial interrogation would make the right to counsel depend not on the suspect's choice, but on the clarity with which he expresses that choice.

B. The lower courts were correct in treating petitioner's reference to a lawyer as ambiguous. The remark was sufficiently tentative in nature that it was not unreasonable for the NIS agents to cease their questioning and seek to determine whether petitioner's remark was intended as an invocation of his right to counsel. Nor was there anything improper about the agents' conduct of the brief session devoted to determining petitioner's wishes with regard to the presence of counsel. The agents did not suggest that petitioner should not request counsel, nor was there anything about their conduct that would have been interpreted as sending that message. In fact, they fully advised him that he had the right to request an attorney, and that if he did so they would not question him any further.

II. Even if it was error to admit the statements that petitioner made after his ambiguous reference to counsel, that error was harmless beyond a reasonable doubt. Petitioner's statements, which were contained in only half a page of the more than 700 pages of trial record, were in part simply a repetition of a statement he made earlier, and no part of his statement constituted an admission of guilt. The statements at issue in this case were inconsequential when compared to the overwhelming evidence of petitioner's guilt.

ARGUMENT

I. THE COURT OF MILITARY APPEALS CORRECTLY UPHELD THE ADMISSION OF THE STATEMENTS THAT PETITIONER MADE AFTER HIS AMBIGUOUS REFERENCE TO COUNSEL

A. Law Enforcement Officers May Ask Questions To Clarify A Suspect's Wishes When The Suspect Makes An Ambiguous Comment Regarding Counsel During A Custodial Interrogation

The lower federal and state courts have given three different answers to the question of how law enforcement officers should react when a suspect during custodial interrogation makes an ambiguous reference to counsel. Some courts require the officers to cease all questioning once a suspect refers to counsel, however ambiguous the reference may be.[8] Other courts have permitted the officers to continue an interrogation until the suspect makes an unambiguous request for counsel.[9] The third approach, which is

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[8] See *Maglio* v. *Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *People* v. *Superior Court*, 542 P.2d 1390, 1394-1395 (Cal. 1975), cert. denied, 429 U.S. 816 (1976); *State* v. *Furlough*, 797 S.W.2d 631, 639 (Tenn. Crim. App. 1990).

[9] See *People* v. *Krueger*, 412 N.E.2d 57 (Ill. 1980); *Dean* v. *Commonwealth*, 844 S.W.2d 417, 420 (Ky. 1992), petition for cert. pending, No. 92-8835 (filed May 19, 1993); *Eaton* v. *Commonwealth*, 397 S.E.2d 385, 393-394 (Va. 1990).

followed by most courts, requires the officers to cease the interrogation when the suspect makes an ambiguous reference to counsel, but permits the officers to ask questions limited to clarifying the suspect's wishes regarding counsel.[10]

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[10] See, *e.g.*, *United States* v. *Porter*, 776 F.2d 370 (1st Cir. 1985) (en banc); *United States* v. *Gotay*, 844 F.2d 971, 975 (2d Cir. 1988); *Nash* v. *Estelle*, 597 F.2d 513, 517 (5th Cir.) (en banc), cert. denied, 444 U.S. 981 (1979); *United States* v. *D'Antoni*, 856 F.2d 975, 980-981 (7th Cir. 1988); *United States* v. *Nielson*, 392 F.2d 849, 853 (7th Cir. 1968); *United States* v. *Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985), appeal after remand, 833 F.2d 1284, 1287 (9th Cir. 1987), cert. denied, 486 U.S. 1017 (1988); *United States* v. *March*, 999 F.2d 456, 461-462 (10th Cir.), cert. denied, 114 S. Ct. 483 (1993); *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.), cert. denied, 113 S. Ct. 436 (1992); *Hampel* v. *State*, 706 P.2d 1173, 1180 (Alaska Ct. App. 1985); *State* v. *Staatz*, 768 P.2d 143, 146 (Ariz. 1988); *People* v. *Benjamin*, 732 P.2d 1167, 1171 (Colo. 1987); *State* v. *Anderson*, 553 A.2d 589, 592-593 (Conn. 1989); *Crawford* v. *State*, 580 A.2d 571, 576-577 (Del. 1990); *Ruffin* v. *United States*, 524 A.2d 685, 700-702 (D.C. App. 1987); *Martinez* v. *State*, 564 So. 2d 1071, 1073-1074 (Fla. 1990); *Hall* v. *State*, 336 S.E.2d 812, 816-818 (Ga. 1985); *Carter* v. *State*, 702 P.2d 826, 832 (Idaho 1985); *Sleek* v. *State*, 499 N.E.2d 751, 754-755 (Ind. 1986); *People* v. *Giuchici*, 324 N.W.2d 593, 595 (Mich. Ct. App. 1982) (per curiam); *State* v. *Pilcher*, 472 N.W.2d 327, 332 (Minn. 1991); *Kuykendall* v. *State*, 585 So. 2d 773, 776-777 (Miss. 1991); *Sechrest* v. *State*, 706 P.2d 626, 630 (Nev. 1985); *State* v. *Gerald*, 549 A.2d 792, 831-832 (N.J. 1984); *Russell* v. *State*, 727 S.W.2d 573, 575-577 (Tex. Crim. App.), cert. denied, 484 U.S. 856 (1987); *State* v. *Sampson*, 808 P.2d 1100, 1108-1110 (Utah Ct. App. 1991); *State* v. *Robtoy*, 653 P.2d 284, 290 (Wash. 1982); *Cheatham* v. *State*, 719 P.2d 612, 618-619 (Wyo. 1986); *State* v. *Clawson*, 270 S.E.2d 659, 670 (W.Va. 1980); accord Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.9, at 129 (Supp. 1991).

This Court has previously noted the issue presented in this case, but has not had occasion to address it.[11] Nonetheless, the principles underlying this Court's decisions in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and their progeny strongly suggest that such clarifying questions are permissible.[12]

1. *A Rule Permitting Clarifying Questions Respects The Suspect's Right To Decide Whether To Have Counsel Present During Questioning*

Miranda prescribed a set of prophylactic rules the "fundamental purpose" of which is " 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.' " *Barrett*, 479 U.S. at 528 (quoting, with emphasis, *Miranda*, 384 U.S. at 469). Those rules require law enforcement authorities to inform a suspect in custody, among other things, that he has

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[11] See *Connecticut* v. *Barrett*, 479 U.S. 523, 529-530 n.3 (1987); *Smith* v. *Illinois*, 469 U.S. 91, 95-96 & n.3 (1984) (per curiam); see also *Mueller* v. *Virginia*, 113 S. Ct. 1880 (1993) (White, J., dissenting from denial of certiorari).

[12] Although the Court in *Miranda* did not resolve the question presented in this case, the Court recognized the likelihood that in some cases a suspect's invocation of his rights would be equivocal. The Court cited with approval the practice of the FBI relayed to the Court in a letter from Solicitor General Thurgood Marshall: "If [the suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent." 384 U.S. at 385; see also *Anderson* v. *Smith*, 751 F.2d 96, 103 (2d Cir. 1984) ("*Miranda* itself approved such clarifying questions.").

the right to remain silent and to have an attorney present during questioning. *Miranda*, 384 U.S. at 444. *Edwards* prescribed an additional set of rules for cases in which the suspect invokes the right to counsel under *Miranda*. The Court in *Edwards* held that, following such a request, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485; see also *Wyrick* v. *Fields*, 459 U.S. 42 (1982) (per curiam). Thus, *Miranda* imposes on police the duty to inform a suspect that he may choose between answering questions and remaining silent, and between having counsel present during questioning and proceeding without counsel. *Edwards* imposes an additional duty on the authorities that ensures that they respect the suspect's choice regarding counsel. *Moran* v. *Burbine*, 475 U.S. 412, 420 (1986).[13]

[13] The federal statute providing that in "any criminal prosecution brought by the United States" a confession "shall be admissible if it is voluntarily given," 18 U.S.C. 3501(a), is not at issue in this case. It was not raised below, and in any event would appear not to be applicable in court-martial cases. Court-martial cases are not "criminal prosecutions" within the meaning of the Sixth Amendment, see *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Kahn* v. *Anderson*, 255 U.S. 1, 8 (1921), and they therefore would not appear to be "criminal prosecution[s]" for purposes of Section 3501(a). In any event, the admissibility of statements by suspects following violations of the rules of *Miranda* and *Edwards* is governed by Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, and Rules 304 and 305 of the Military Rules of Evidence. Rule 305 guarantees a suspect the right to counsel at a custodial interrogation, and Rule 304 requires suppression of evidence obtained in violation of that right.

In keeping with the fundamental purpose of protecting the suspect's choice whether to have counsel present during custodial questioning, the *Edwards* rule is not "triggered automatically by the initiation of the interrogation itself." *Moran*, 475 U.S. at 433 n.4. Rather, "as both *Miranda* and subsequent decisions construing *Miranda* make clear beyond refute, 'the interrogation must cease until an attorney is present' *only* '[i]f the individual states that he wants an attorney.'" *Moran*, 475 U.S. at 433 n.4 (quoting, with emphasis, *Michigan* v. *Mosley*, 423 U.S. 96, 104 n.10 (1975) (quoting *Miranda*, 384 U.S. at 474)). Thus, a basic requirement for application of the *Edwards* rule is that the accused must "actually invoke[] his right to counsel" by "stating that he wants an attorney." *Smith* v. *Illinois*, 469 U.S. at 95; see also *Minnick* v. *Mississippi*, 498 U.S. 146, 147 (1990) ("the police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel"); *Solem* v. *Stumes*, 465 U.S. 638, 641 (1984) ("once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him").

In light of those principles, the proper response by law enforcement officers to a suspect's ambiguous reference to counsel must be to preserve the suspect's right to choose whether to have counsel present during questioning. The only way for the officers to preserve that choice is to determine whether the suspect actually wishes to have counsel present during any custodial questioning, which may not be obvious from

the suspect's words or actions without further inquiry.

Any other response would "require authorities to ignore the tenor or sense of a [suspect's] response to th[e] [*Miranda*] warnings." *Barrett*, 479 U.S. at 528. If, for example, the officers presume that any reference to counsel, however vague or equivocal, is a request for counsel, they may be making a decision for the suspect that the suspect has not made on his own. If, on the other hand, they continue interrogating a suspect, despite an ambiguous reference to counsel, they may be overriding the suspect's desire to have counsel present simply because he has not made the request with sufficient precision.

To fulfill the "fundamental purpose" of *Miranda*, a law enforcement officer may not rely on a presumption in either direction regarding a suspect's choice between going forward with a lawyer or proceeding without one. Cf. *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2209 (1991) ("the *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*"). Instead, the officer must determine what choice the suspect has actually made, and to make that determination the officer must be able to ask clarifying questions.

2. *A Rule Permitting Clarifying Questions Comports With The Balance Of Interests Struck In* Miranda *and* Edwards

The rules enunciated in *Miranda* and *Edwards* are designed to strike an appropriate balance between the competing concerns implicated by custodial interrogation. *Moran*, 475 U.S. at 426. A rule permitting law enforcement officers to clarify a suspect's ambiguous reference to counsel preserves, rather than upsets, that balance.

This Court has explained that "custodial interrogations implicate two competing concerns" that *Miranda* attempted to reconcile." *Moran*, 475 U.S. at 426. "On the one hand, 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted.' " *Moran*, 475 U.S. at 426 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973)). "Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 526 (quoting *United States* v. *Washington*, 431 U.S. 181, 186 (1977)); see *McNeil*, 111 S. Ct. at 2210. On the other hand, "the Court has recognized that the interrogation process is 'inherently coercive' and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Moran*, 475 U.S. at 426. A rule permitting the police to clarify a suspect's ambiguous reference to counsel strikes a proper balance between those concerns by giving the suspect "the power to exert some control over the course of the interrogation," *ibid.*, without unduly impeding "legitimate law enforcement [activities]," *id.* at 427.

The rule permitting clarifying questions recognizes that some suspects in custody may want counsel but be unable to articulate their wishes clearly. Under the rule, the suspect does not have to say that he wants an attorney in clear and unequivocal terms in order to cut off the interrogation. An ambiguous or equivocal reference suffices to stop the interrogation until the suspect's wishes are clarified. Thus,

the suspect has the burden of making his wishes known, but that burden must be viewed in light of the inarticulateness of some suspects and the pressures generated by a custodial setting. See *Miranda*, 384 U.S. at 445-458.

The rule permitting clarifying questions must, of course, be administered to avoid the risk of police badgering, the concern that underlies the bright-line rule of *Edwards*. See *McNeil*, 111 S. Ct. at 2208; *Minnick*, 498 U.S. at 150; *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion). Once a suspect has made an ambiguous reference to counsel, the officers may ask only questions designed to ascertain the suspect's wishes. The officers may not ask questions about the offense under investigation. Nor may they seek to dissuade the suspect from requesting a lawyer.[14] The questions must be objectively neutral and limited to ascertaining, not influencing, the choice that the suspect is entitled to make freely under *Miranda* and *Edwards*. See, *e.g.*, *United States* v. *Cherry*, 733 F.2d 1124, 1130-1131 (5th Cir. 1984); *Thompson* v. *Wainwright*, 601 F.2d 768, 771-772 (5th Cir. 1979); *Crawford* v. *State*, 580 A.2d 571, 577 (Del. 1990); see also *Towne* v. *Dugger*, 899

[14] An officer is not permitted, in our view, to state or suggest that the suspect does not really need an attorney. Thus, we think that the officer's response to the suspect's ambiguous reference to counsel in *Mueller* was improper. 113 S. Ct. at 1880 (when suspect asked officer "Do you think I need an attorney here?", officer "responded by shaking his head from side to side, shrugging, and stating: 'You're just talking to us' ").

F.2d 1104, 1109 (11th Cir.), cert. denied, 498 U.S. 991 (1990).[15] As one court put the point succinctly:

> The pragmatic approach occupies a sensible middle ground between, on one hand, giving 'talismanic effect' to any vague mention of an attorney and, on the other hand, insisting that accused persons in custody invoke their rights in language free from all possible ambiguity. This approach protects the accused person without unduly interfering with reasonable police questioning.

State v. *Moulds*, 673 P.2d 1074, 1082 (Idaho Ct. App. 1983).

3. *A Rule Permitting Clarifying Questions Provides A Bright Line For Police And Courts To Follow*

One of the principal purposes of the rules fashioned in *Miranda* and *Edwards* was to "inform[] police and prosecutors with specificity as to what they must do in conducting custodial interrogations, and [to] * * * inform[] courts under what circumstances statements obtained during such interrogation are not admissible." *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988). A rule permitting law enforcement officers to clarify a suspect's ambiguous reference to counsel offers sufficiently clear direction to courts and police to satisfy that important feature of *Miranda* juris-

[15] Contrary to petitioner's assertion (Pet. Br. 25, 28), clarifying questions are not likely to be perceived by the suspect as "badgering." On the contrary, it is more likely that such questions, like the *Miranda* warnings themselves, will indicate to the suspect that the police recognize and are prepared to honor his right to counsel. Cf. *Miranda*, 384 U.S. at 468.

prudence. See *United States* v. *Gotay*, 844 F.2d at 975.

An important feature of the rule permitting clarifying questions is that it relieves the police officer of the need to speculate about the suspect's wishes in cases in which there may be doubt whether the suspect has meant to invoke his right to counsel. Regardless of where a particular court draws the line, there will always be cases in which it is difficult to know whether what the suspect has said is enough to constitute an invocation of counsel under *Edwards*. The "clarification" rule has the simple virtue of permitting the officer to solve that dilemma by seeking further information to ascertain the suspect's choice. In most cases, that information can be obtained through a few simple questions that should not be difficult to formulate. Such "[c]larification efforts will more often than not settle matters—and settle them correctly." J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 1016 n.159 (1986).[16]

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[16] Petitioner suggests, Br. 30-33 & n.33, that by avoiding the need for clarifying questions, his standard provides a "bright line" rule that will be easy to apply and will eliminate "disputes over simple historical facts and facilitate appellate review." *Id.* at 33 n.33. But courts will always have to resolve factual disputes about what was said during the interrogation. Petitioner recognizes as much, as he admits in a footnote that, even under his standard, agents would be permitted to ask clarifying questions in some cases, although he would characterize the class of such cases as those in which "it is possible, but unlikely that a suspect is requesting counsel." Pet. Br. 33 n.34. By acknowledging that there will be ambiguity (and the need for clarification) under his standard as well, petitioner essentially concedes that his test does not provide any brighter line than the majority test—it simply moves the line.

In those cases that give rise to litigation, courts will have to decide two questions, both of which entail relatively straightforward, objective inquiries. The first is whether a suspect's reference to counsel was ambiguous. See, *e.g.*, *United States* v *Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.) (applying objective standard to determine whether suspect's reference to counsel was ambiguous) cert. denied, 113 S. Ct. 436 (1992). That question, of course, must be addressed under any approach for dealing with ambiguous references to counsel. See *People* v. *Benjamin*, 732 P.2d 1167, 1170 (Colo. 1987) ("Whatever the standard might be, it is apparent that '[o]n occasion, an accused's asserted request for counsel may be ambiguous or equivocal.'") (quoting *Smith*, 469 U.S. at 95)). The second question, which arises only if the court determines that a reference to counsel is ambiguous, is whether the officer's subsequent questions to the suspect were limited to clarifying the suspect's wishes regarding the presence of counsel during questioning. Although that question may be difficult to answer in some cases, it is not analytically complicated and does not detract significantly from the "bright line" character of the majority rule. See *United States* v. *D'Antoni*, 856 F.2d 975, 890-981 (7th Cir. 1988) (applying objective standard to determine whether officer's questioning was clarification or further interrogation).

4. *Other Approaches To A Suspect's Ambiguous Reference To Counsel Do Not Comport With The Balance Underlying* Miranda *and* Edwards

A few courts have held that the police must stop all questioning when a suspect refers to counsel, how-

ever ambiguous the reference may be. Under that approach, any reference to a lawyer is deemed a request for counsel. The other minority approach permits the police to continue an interrogation until the suspect makes an unambiguous request for counsel. Under that approach, ambiguous references to counsel are ignored. Neither approach strikes the proper balance between the concerns underlying *Miranda* and *Edwards*.

a. The approach under which virtually any reference to a lawyer is deemed a request for counsel "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," *Mosley*, 423 U.S. at 102, because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. See *United States* v. *Gotay*, 844 F.2d at 975.

As a factual matter, it is a mistake to assume that every suspect's ambiguous reference to an attorney indicates a desire to deal with the police only through a lawyer. As the en banc Fifth Circuit has observed,

> [w]hile the suspect has an absolute right to terminate station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice. Some persons are moved by the desire to unburden themselves [by] confessing their crimes to police, while others want to make their own assessment of what to say to their custodians.

Nash v. *Estelle*, 597 F.2d 513, 517 (5th Cir.) (en banc), cert. denied, 444 U.S. 981 (1979). An approach that ignores the suspect's choice to proceed without a lawyer effectively "deprive[s] suspects of

an opportunity to make informed and intelligent assessments of their interests." *Mosley*, 423 U.S. at 102; see also *id.* at 109 (White, J., concurring) (the Court has "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own case"); cf. *Minnick*, 498 U.S. at 155 ("Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system.").

Petitioner argues (Pet. Br. 23-24) that a rule deeming any reference to a lawyer to be a request for counsel is supported by this Court's cases holding that a waiver of the right to counsel will not be recognized unless the waiver is clear and unequivocal. See *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986) (doubts will be resolved against finding waiver of Sixth Amendment right to counsel). In this case, however, petitioner had already waived his right under *Miranda* to have counsel present during questioning; the only question raised by his reference to a lawyer was whether he had decided to change his mind and invoke that right instead. As this Court has explained, the rule of *Edwards* "embodies two distinct inquiries": first, whether a suspect has "actually invoked his right to counsel * * * in the first instance"; and, second, whether, having invoked his right to counsel, the suspect subsequently waived it. *Smith*, 469 U.S. at 95; see also *McNeil*, 111 S. Ct. at 2209. By analogy, a case such as this one involves two equally distinct inquiries: whether the defendant initially waived his right to counsel, and whether, having waived that right, he has actually invoked the right and effectively withdrawn his waiver. Once the suspect has validly waived counsel—and petitioner did

so at the outset of the November 4 interview—it is reasonable for the police (and the courts) to rely on that waiver until it is reasonably apparent that the suspect has changed his mind. And in order to determine whether he has changed his mind, the interrogating officer should be permitted to ask questions directed to that issue.

A rule deeming any reference to a lawyer to be a request for counsel is not justified by the need for a "bright line" rule to guide law enforcement officers and courts. While such a rule might be easy to apply, it would also lead to absurd results. It would, for example, seem to require the police to stop an interrogation if a suspect with poor hearing asks an officer to repeat the *Miranda* warning "about having a lawyer." It is therefore not surprising that even petitioner ultimately eschews such a rule, conceding (Pet. Br. 22) that "not every reference to an attorney by a suspect in custody requires that questioning cease." Yet petitioner's contention that an ambiguous reference to counsel should be construed as a request for counsel if it "would be understood by ordinary people as a request for counsel" (*id.* at 16) does not provide any "brighter line" than that afforded under the majority approach that we urge the Court to adopt.[17] The effect of adopting petitioner's

[17] The difference between the definition of ambiguity that we advocate and that urged by petitioner is somewhat subtle, but it is important. Under the rule for which we contend, a reference to counsel would be considered ambiguous if the statement, objectively viewed, did not make clear the suspect's desire to consult with an attorney before further questioning. Petitioner would define a statement as unambiguous if "ordinary people could reasonably understand" the statement, in context, as a request for counsel. Pet. Br. 11. While that standard is less extreme than the standard that requires termination of interrogation upon any reference to a lawyer at all, it is still significantly broader than the majority rule for which we argue, and it relies on a strained use of the term "unambiguous." It is contrary to the normal use of that term to characterize as "unambiguous" a statement that others "could reasonably understand" to have a particular meaning. Under our standard, a reference to counsel is ambiguous if it is unclear whether it was intended to constitute an invocation of the right to counsel. Under petitioner's standard, a reference to counsel is ambiguous only if it could *not* reasonably by understood to constitute an invocation of the right to counsel. In addition, there is a circularity to petitioner's argument on this point: He suggests (Br. 22) that because the NIS agents stopped questioning petitioner and sought to clarify his reference to a lawyer, they must have understood his comment as a request for counsel. But if that is the test, clarifying questions will never be permitted, because asking such questions will be interpreted as an admission by the officers that they understood the defendant's remark to be an invocation of counsel, which in turn would require them to terminate the interview altogether.

rule forbidding any clarifying questions, however, would be that in a number of cases, confessions could not be elicited, or would have to be suppressed, even though the suspect never actually wanted to consult with counsel at all. In the criminal justice system, which depends so much on admissions of guilt, such a result would exact a huge price while producing no appreciable benefit in return.

b. The approach that permits law enforcement officers to continue an interrogation until the suspect has made an unambiguous request for a lawyer is equally at odds with the principle of "free choice" that underlies *Miranda* and *Edwards*. Permitting officers to ignore any request for counsel but one articulated in precisely the right terms poses an un-

due risk of discouraging suspects from exercising their right to have a lawyer present during questioning. For example, if a suspect says to a law enforcement officer, "Don't you think I should get a lawyer?", the ambiguity created by the fact that the statement is phrased as a question should not justify the interrogating officer's ignoring the question and continuing to interrogate the suspect about the offense under investigation.[18] Instead, in order to protect the suspect's right to have counsel present before further interrogation, the police should have to interrupt the interrogation at that point to determine whether the suspect wishes to invoke his right to counsel under *Miranda*.

B. The NIS Agents Did Not Interfere With Petitioner's Right To Counsel Under *Miranda* and *Edwards*

1. *Petitioner's Reference To Counsel Was Ambiguous*

Petitioner argues at some length (Pet. Br. 13, 15-23) that his statement "Maybe I should talk to a lawyer" was not ambiguous. This Court should decline to address that argument, because it is not fairly included within the question as to which this Court granted certiorari. See Rule 14.1(a) of the

[18] Of course, not every mention of the word "lawyer" rises to the level of an ambiguous or equivocal reference that could be intended as an invocation of the right to counsel. Thus, if a suspect said, "My lawyer told me that they can't convict you of bank robbery if you don't actually go into the bank," the reference to a lawyer would not even arguably suggest an intention to invoke counsel. In that setting, we submit, there would be no obligation on the part of the police to suspend questioning for clarification of the suspect's wishes.

Rules of this Court; see also, *e.g.*, *Izumi Seimitsu Kogyo Kabushini Kaisha* v. *U. S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam). The question set forth in the petition for a writ of certiorari assumes that petitioner's reference to counsel was ambiguous. Pet. i ("When a suspect makes an *ambiguous* request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?") (emphasis added). Petitioner therefore should not be entitled to contend otherwise now.

In any event, the Court of Military Appeals was correct in concluding that petitioner's reference to counsel was ambiguous. Pet. App. 10a. Petitioner concedes that "the word 'maybe' reflects some ambiguity." Pet. Br. 15 n.19.[19] Contrary to petitioner's contention (*id.* at 11), the supposedly "coercive" context in which the statement was made did not "dis-

[19] Contrary to petitioner's suggestion (Pet. Br. 23 n.25), numerous courts have held that references to counsel substantially similar to his are ambiguous. See *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1471 (11th Cir. 1992) ("I don't know if I need a lawyer—maybe I should have one, but I don't know if it would do me any good at this point."), cert. denied, 113 S. Ct. 483 (1993); *Robtoy* v. *Kincheloe*, 871 F.2d 1478, 1479 (9th Cir. 1989) ("maybe I should call my attorney"), cert. denied, 494 U.S. 1031 (1990); *Smith* v. *Endell*, 860 F.2d 1528, 1531 (9th Cir. 1988), cert. denied, 498 U.S. 981 (1990); *United States* v. *Cherry*, 733 F.2d 1124, 1127 (5th Cir. 1984) ("Maybe I should talk to an attorney."); *State* v. *Staatz*, 768 P.2d 143, 145 (Ariz. 1988) (en banc) ("Maybe I should be talking to a lawyer"; "Maybe it would be in my best interests to speak to a lawyer."); *State* v. *Moulds*, 673 P.2d 1074 (Idaho Ct. App. 1983) ("Maybe I need a lawyer."); *People* v. *Krueger*, 412 N.E.2d 537, 538 (Ill. 1980) ("Maybe I ought to have an attorney"; "Maybe I need a lawyer"; "Maybe I ought to talk to a lawyer.").

pel[]" that ambiguity. As discussed above, that statement was made after petitioner had been given *Miranda* warnings both orally and in writing and had signed a form that stated:

> I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

J.A. 170 (AX 37); see also J.A. 118-119, 151-152, 175 (AX 40). Petitioner does not dispute that he was adequately advised of his rights under *Miranda* and *Edwards* and that he understood them. Nor does he contend that the NIS agents who questioned him did anything improper between the time they advised him of his rights and the time he made the reference to counsel at issue here.[20] The agents' compliance with the procedural safeguards in *Miranda* and *Edwards* prior to that reference "dissipated" any coercive pressures generated by the custodial setting. See *Moran*, 475 U.S. at 425.

2. *The NIS Agents Properly Limited Their Inquiries Concerning Petitioner's Ambiguous Reference To Counsel*

The Court of Military Appeals correctly held that the NIS agents stayed within proper limits following petitioner's ambiguous reference to counsel. Pet.

[20] Petitioner suggests (Pet. Br. 36) that the agents should have instructed him "that there was nothing improper about [a] request for an attorney." Petitioner does not cite any legal support for adding such an instruction to the *Miranda* warnings.

App. 10a-11a. Petitioner's arguments to the contrary are unpersuasive.

Petitioner relies primarily (Pet. Br. 34-36) on the agents' statement to him that they were not there to violate his rights. Petitioner admits that the agents' statement was "perhaps literally true." Pet. Br. 34. He nonetheless contends that the statement was misleading because "the Agents were not there to protect his rights either." *Ibid.*

The statement cited by petitioner was not misleading. It implied no more than was implied by giving the *Miranda* warnings in the first place: that the agents were aware of, and intended to honor, petitioner's rights. *Miranda*, 384 U.S. at 468. Moreover, the statement was plainly innocuous, considered in context. Immediately after the agents made the statement, they told petitioner that if he wanted a lawyer, they would "stop any kind of questioning of him," and that they merely wanted to "have it clarified is he asking for a lawyer." J.A. 136.

Petitioner also argues (Pet. Br. 37) that the "military environment in which the interrogation took place * * * undermined the voluntariness of [his] waiver of his right to counsel." That argument is premised on his assertion (*id.* at 38-39) that "a servicemember's right to counsel must be guarded in ways unnecessary for civilians." This Court has made clear, however, that the rules of *Miranda* and *Edwards* do not operate differently in the military setting. See *Wyrick*, 459 U.S. at 48-49; see also *United States* v. *Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

Finally, petitioner contends (Pet. Br. 39-41) that his psychiatric condition made him particularly susceptible to official overreaching. But there was no

overreaching by the NIS agents, either as found by any court below or as disclosed by the evidence. The agents simply inquired as to petitioner's wishes and then, after a break, resumed the questioning when petitioner indicated clearly that he did not wish to have counsel present during questioning.

Petitioner does not suggest that he was unable to understand his rights because of a lack of education (he had a high school education (Defendant's Exhibit R)) or a mental illness (he was diagnosed as having "ineffective individual coping skills," AX 51, at 3, and an antisocial personality, PX 63). Nor does he suggest that he was somehow unable to exercise the choice to have counsel, once that choice was explained to him. Under those circumstances, the court of appeals properly concluded that petitioner's waiver of the right to counsel under *Miranda* and *Edwards* was both knowing and voluntary.

II. EVEN IF IT WAS ERROR TO ADMIT THE STATEMENTS MADE BY PETITIONER AFTER HIS AMBIGUOUS REFERENCE TO COUNSEL, THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Any error in the admission of the statements petitioner made after his ambiguous reference to counsel was harmless beyond a reasonable doubt. See *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2081, 2083 (1993); *Arizona* v. *Fulminante*, 499 U.S. 279, 306-312 (1991). The Court of Military Appeals therefore correctly upheld petitioner's conviction.

The statements that followed petitioner's ambiguous reference to a lawyer were inconsequential. After that point in the questioning, petitioner merely repeated what he had previously told the NIS agents

about his October 5 conversation with Petty Officer Guidry regarding the way Shackleton had died. In addition, petitioner asserted that "Jeff Kaiser" had killed Shackleton. See AX 38, 40; Tr. 961.

Those remarks were only mildly incriminating, and they occupied less than half a page of testimony in a trial record more than 700 pages in length. The statements were particularly insignificant when compared to the powerful evidence of petitioner's guilt adduced through other evidence at trial. The government presented five witnesses who placed both petitioner and Shackleton at the Enlisted Men's Club on the night of the murder. Tr. 579-585, 606-607, 619-620, 639-641, 648. Forensic evidence also tied petitioner to the crime. A forensic chemist testified that petitioner's blood type was B and that Shackleton's was O. PX 21; Tr. 907, 914. The chemist found blood of the victim's type on petitioner's pants and spots of blood on petitioner's tennis shoes. PX 23; Tr. 911-912. A human blood stain also was found on petitioner's pool cue case. PX 21; Tr. 906. Moreover, at various times petitioner made statements to fellow sailors in which he either specifically admitted assaulting Shackleton or otherwise implicated himself in that crime. Lieutenant Moss and Petty Officers Guidry, Stephen Brothers, Scott Richard Kuhn, and Walter Crayton Black recounted petitioner's various incriminating statements. Petty Officer Ronald Mull also retold petitioner's confession in which he admitted murdering Shackleton because Shackleton had reneged on a wager. Tr. 702, 707-708, 714, 728, 746-747, 1103. And finally, in a portion of the NIS interviews not challenged here, petitioner made false exculpatory statements to the NIS agents when he said that he had learned about the facts of the crime from Everett

Wade Bielby and Bonnie Krusen, neither of whom spoke with petitioner during the relevant period, and when he said that he had spent the night of the murder with his girlfriend, who denied that claim. Tr. 852-853, 855, 957-958.

The evidence at the court-martial proceeding thus overwhelmingly established that petitioner beat Keith Shackleton with a pool cue, causing him to fall and suffer fatal head injuries. Admission of the few statements obtained after petitioner's comment about counsel could not have had a material effect on the outcome of petitioner's trial.

CONCLUSION

The judgment of the Military Court of Appeals should be affirmed.

Respectfully submitted.

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